MERIMEM ONLINE SDN BHD
v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[CIVIL APPEAL NO: WA-14-17-06-2020]
29 MAY 2023

Abstract – *(i) For a pioneer company that is already operating in Malaysia, its income for each accounting period of its pioneer business shall be the 'value-added income' which is less the 'inflation-adjusted base income' of the company and which income is determined by the statutory formula provided by s. 21C(2A)(b) of the Promotion of Investments Act 1986. Only the whole of the company's 'value-added income' is exempted while the remaining statutory income is chargeable income for tax purposes; (ii) Section 91(3) of the Income Tax Act 1967 is clear and unambiguous in expressly empowering the Director General of Inland Revenue ('DGIR') to make an assessment where the taxpayer is negligent; (iii) when a taxpayer has recklessly and carelessly submitted incorrect returns, the DGIR is clearly authorised to impose a penalty.*

REVENUE LAW: *Income tax – Special Commissioners of Income Tax ('SCIT') – Findings – Appeal against decision made by SCIT pertaining to taxpayer's appeal against assessments raised by Director General of Inland Revenue ('DGIR') – Whether taxpayer as pioneer company entitled to tax reliefs – Whether taxpayer's 'value-added income' exempted while remaining statutory income chargeable income for tax purposes – Whether taxpayer careless and reckless in responsibility to submit correct returns – Income Tax Act 1967, s. 91(3) – Whether DGIR correct in imposing penalties under s. 113(2) of Income Tax Act 1967 – Promotion of Investments Act 1986, ss. 6(1AB) & 21C*

This was the appellant's appeal against the decision of the Special Commissioners of Income Tax ('SCIT') pertaining to the appeal by the appellant against the assessments raised by the respondent, Director General of Inland Revenue ('DGIR'), under the Income Tax Act 1967 ('ITA'). The deciding order of the SCIT had stated that, *inter alia,* the appellant had failed to prove that the assessments were either excessive or erroneous. The appellant was a company which was granted the Multimedia Super Corridor ('MSC') Malaysia pioneer status under s. 6(1AB) of the Promotion of Investments Act 1986 ('PIA'). A pioneer certificate was issued by the Ministry of International Trade and Industry ('MITI'). The production day of the appellant was stated as 31 July 2008 with the pioneer period granted for a period of five years from 31 July 2008 to 30 July 2013. The pioneer

period was subsequently extended five more years from 31 July 2013 to 30 July 2018. The appellant had also been in operations prior to the grant of the pioneer status and through its tax agents had filed its tax returns for the YAs 2009 and 2010 on 6 October 2010, YA 2011, YA 2012, YA 2013, YA 2014, YA 2015 and YA 2016. The dispute between the parties began when the appellant, through its tax agent, Ernst & Young Tax Consultants Sdn Bhd ('Ernst & Young'), sent a letter to the DGIR requesting a ruling to confirm that 100% of the appellant's statutory income during the pioneer period was exempted from income tax pursuant to s. 21C of the PIA. The DGIR replied in a letter stating that s. 21C(2A) was to be read together with the proviso appearing in s. 21C(2) of the PIA, and as such, the difference between the statutory income and value-added income was subject to income tax. Ernst & Young replied stating that the ruling was disputed and the appellant would be filing the necessary appeals to the SCIT. The DGIR made the necessary amendments according to its ruling and proceeded to issue the following notices: (i) a notice of additional assessment ('Form JA') for YA 2009; (ii) notices of assessment ('Form J') for the YA 2010 and YA 2011; and (iii) Form J for YA 2012 and YA 2013. In issuing Forms J and JA for the YAs 2009, 2010, 2011, 2012 and 2013, the DGIR also imposed penalties pursuant to s. 113(2) of the ITA. The appellant complained that the assessments were unlawfully made and that Forms J and Forms JA for the YAs 2009 and 2010 were issued more than five years after the expiration for the said YAs respectively. In respect of YAs 2014, 2015 and 2016, the appellant filed its tax returns in accordance with the DGIR's ruling on the interpretation of s. 21C of the PIA, which was done under protest as the appellant duly proceeded to appeal against the self-assessment it had made for these YAs. The issues that arose in this appeal were (i) whether Form JA and J for YA 2009 and YA 2010 dated 27 June 2016 were time-barred under s. 91 of the ITA; (ii) whether the appellant's income during the pioneer period was subject to income tax; and (iii) whether the DGIR was correct in imposing penalties under s. 113(2) of the ITA for the YAs 2009 to 2013.

Held (dismissing appeal):

(1) A pioneer company would be entitled to tax reliefs from income tax. According to s. 14 of the PIA, 'the tax relief period of a pioneer company shall begin on its production day and continue for a period of five years'. The computation of income during the tax relief period of a company which has been granted pioneer status under s. 6(1AB) is s. 21C of the PIA. In this regard, s. 1(2) of the PIA provides that the Act shall be read and construed as one with the ITA while s. 20 of the PIA provide that so much of Part V of the ITA which is applicable to a company shall apply as if the income of a pioneer company in respect of its pioneer business was chargeable to tax. (para 23)

(2) Section 21C(2) makes it plain and clear that subject to any condition which may be specified in the pioneer certificate (*ie* issued under s. 7 of the PIA) the income of the company for each accounting period of its pioneer business: (i) shall be computed in accordance with the ITA by treating each accounting period as the basis period for the YA; and (ii) ascertaining the income in question as if it were the statutory income from the pioneer business for that year of assessment. However, by virtue of the proviso to s. 21C(2), the general position stated in sub-s. (2) does not apply to a pioneer company that was already operating in Malaysia. For such a company, the appellant being one, its income for each accounting period of its pioneer business shall be the 'value-added income.' The phrase 'value-added income' is made plain and clear by s. 21C(2A)(a) wherein the phrase is defined to mean: the statutory income for the basis period for the year of assessment less the inflation-adjusted base income. So, the value-added income of the company was less the 'inflation-adjusted base income' of the company and which income is determined by the statutory formula provided by s. 21C(2A)(b). Thus, only the whole of the appellant's 'value-added income' was exempted while the remaining statutory income was chargeable income for tax purposes. There was no ambiguity in the provision. The SCIT did not misdirect itself in law and had correctly interpreted s. 21C of the PIA. (paras 25 & 26)

(3) The appellant must take prudent action in seeking the DGIR's view where there is a doubt of the interpretation of a provision by the taxpayer or his tax agent. The appellant contended that the DGIR did not take prompt action and delayed in giving his ruling and issuing the additional assessments. Section 91(3) of the ITA was clear and unambiguous. It expressly empowers the DGIR to make an assessment where the taxpayer had been negligent. There is no limitation to this power, such as, any contributory conduct on the part of the DGIR. The appellant had been careless and even reckless in his responsibility to submit correct returns in the instant case. The responsibility was imposed on the taxpayer by the ITA and the appellant as the taxpayer here clearly failed to give care and attention to the filing of the amended returns promptly according to the ruling of the DGIR. The circumstances of the case did not warrant appellant interference. The decision of the SCIT was upheld. (paras 38 & 39)

(4) After due consideration of all relevant facts and circumstances, the SCIT had dismissed the appeal against the imposition of penalty under s. 113(2) of the ITA. The SCIT found that the DGIR had correctly exercised his discretion in imposing penalty. The undisputed facts showed that the appellant had submitted incorrect returns and had further delayed the submission of the amended returns notwithstanding

that the DGIR had conveyed his position on the interpretation of s. 21C of the PIA much earlier. The DGIR was clearly authorised to impose penalty where the taxpayer had submitted an incorrect return. The penalty imposed was also at a low rate which was an indication that the DGIR had carefully weighed all the circumstances before him. There was thus no reason for this court to interfere with the deciding order of the SCIT. (paras 42, 43 & 47)

Case(s) referred to:

Chua Lip Kong v. Director-General Of Inland Revenue [1981] 1 LNS 157 PC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Classic Japan (M) Sdn Bhd [2022] 3 AMR 813 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135 SC ***(refd)***

Mamor Sdn Bhd v. Director-General Of Inland Revenue [1979] 1 LNS 145 ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 10 CLJ 114 CA ***(refd)***

UHG v. Director-General Of Inland Revenue [1974] 1 LNS 181 FC ***(refd)***

Uniqlo (Malaysia) Sdn Bhd v. Ketua Pengarah Kastam Dan Eksais [2020] 9 CLJ 521 CA ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 91(1), (3)(b), 113(2), Schedule 5 paras 23, 34(1), 37, 39

Promotion of Investments Act 1986, ss. 1(2), 2, 5(1A), 6(1AB), (5), 7, 14, 20, 21C(2), (2A)(a), (b)

For the appellant - Jason Tan Jia Xin, Chris Toh Pei Roo & Chua Chun Yang; M/s Lee Hishamuddin Allen & Gledhill

For the respondent - Noor Kamaliah Mohamad Japeri; SRC, Wan Khairuddin Wan Montil, Anis Afiqah Che Rahim & Siti Aisyah Yusoff; RCs

Reported by Suhainah Wahiduddin

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] On 12 January 2023, I dismissed the appellant's, Merimem Online Sdn Bhd, appeal against the decision of the Special Commissioners of Income Tax ("the SCIT") delivered on 4 July 2018. The decision of the SCIT pertains the appeal by the appellant against the assessments raised by the respondent, the Director General of Inland Revenue ("the DGIR") under the Income Tax Act 1967 ("the ITA"),

[2] The deciding order of the SCIT stated that:

(i) the appellant had failed to prove that the assessments were either excessive or erroneous;

(ii) that the additional assessments for the year of assessment ("YA") 2009 and the YA 2010 were not barred by limitation under sub-s. 91(1) of the ITA; and

(iii) the income of the appellant which is subject to exemption from tax for the pioneer period for the YAs 2009, 2010, 2011, 2012 and 2013 is the value-added income of the appellant in accordance with sub-s. 21C(2) of the Promotion of Investments Act 1986 ("the PIA"). The decision of the DGIR was upheld.

[3] The appellant, dissatisfied with the decision of the SCIT filed a notice of appeal dated 7 August 2018 requiring the SCIT to state a case for the opinion of this court pursuant to para. 34, Schedule 5 of the ITA. It is to be noted that no witnesses were called by the parties before the SCIT and the case was decided on the statement of agreed facts and supporting documents.

[4] The reasons for my decision are stated below.

Background Facts

[5] It is agreed that the appellant is a company incorporated in Malaysia having its registered office at Block D, UPM-MTDC Technology Centre III, Universiti Putra Malaysia, Serdang. The appellant has been granted Multimedia Super Corridor ("MSC") Malaysia pioneer status under sub-s. 6(1AB) of the PIA.

[6] The appellant had fulfilled the MSC qualifying activities which are as follows:

(i) provision of research, design, development and commercialisation of the following solutions:

  (a) re-Takaful portal V1 and above;

  (b) motor underwriting solution V1 and above;

  (c) motor claims solution V7.0 and above;

  (d) non-motor claims solution V3.0 and above; and

  (e) marine cargo underwriting solution V2.0 and above.

(ii) provision of implementation, technical services and maintenance related to the abovementioned solutions.

[7] Subsequently, a pioneer certificate was issued by the Ministry of International Trade and Industry ("MITI"). The production day of the appellant was stated as 31 July 2008 with the pioneer period granted for a period of five years from 31 July 2008 to 30 July 2013. The pioneer period was subsequently extended five more years from 31 July 2013 to 30 July 2018. It is also an agreed fact that the appellant's financial period ends on 30 June every year.

[8] It is pertinent to observe that the appellant has been in operation prior to the grant of the pioneer status and through its tax agents had filed its tax returns on the respective stated dates for the following YAs:

(i) for the YAs 2009 and 2010 on 6 October 2010;

(ii) for the YA 2011 on 10 October 2011;

(iii) for the YA 2012 on 7 February 2013;

(iv) for the YA 2013 on 13 February 2014;

(v) for the YA 2014 on 27 February 2015;

(vi) for the YA 2015 on 29 February 2016; and

(vii) for the YA 2016 on 28 February 2017.

[9] The dispute between the parties began when the appellant through its tax agent, Ernst & Young Tax Consultants Sdn Bhd ("Ernst & Young") sent a letter dated 29 October 2012 to the DGIR requesting a ruling to confirm that 100% of the appellant's statutory income during the pioneer period is exempted from income tax pursuant to s. 21C of the PIA.

[10] In a letter dated 11 March 2014, the DGIR replied stating that sub-s. 21C(2A) is to be read together with the proviso appearing in sub-s. 21C(2) of the PIA, and as such, the difference between the statutory income and value-added income is subject to income tax. In a letter dated 1 April 2015, Ernst & Young replied stating that the ruling was disputed and the appellant would be filing the necessary appeals to the SCIT. In this letter was also enclosed the amendments made to the tax returns of the appellant for the YAs 2009, 2010, 2011, 2012 and 2013.

[11] The DGIR made the necessary assessments according to its ruling and proceeded to issue the following notices:

(a) a notice of additional assessment ("Form JA") dated 27 June 2016 for the YA 2009;

(b) notices of assessment ("Form J") dated 27 June 2016 for the YA 2010 and the YA 2011; and

(c) Form J dated 28 June 2016 for the YA 2012 and the YA 2013.

[12] In issuing Forms J and Forms JA for the YAs 2009, 2010, 2011, 2012 and 2013, the DGIR also imposed penalties pursuant to sub-s. 113(2) of the ITA. The appellant complained that the assessments were unlawfully made and that Forms J and Forms JA for the YAs 2009 and 2010 were issued more than five years after the expiration for the said YAs respectively. The appellant appealed to the SCIT against the said assessments by way of notices of appeal in Form Q.

[13] In respect of YAs 2014, 2015 and 2016, the appellant filed its tax returns in accordance with the DGIR's ruling on the interpretation of s. 21C of the PIA. This was obviously done under protest as the appellant duly proceeded to appeal against the self-assessment it had made for these YAs. This action was not strange as the ITA deems a self-assessment as an assessment made by the DGIR.

[14] It is an agreed fact that in view of the appellant's accounting period for its financial year, the appellant's income tax returns for the YA 2009 were only submitted on 6 October 2010. This is about 16 months after the end of the financial year period.

Issues For Determination

[15] The appeal before me requires the following three issues to be determined:

(i) whether Form JA for the YA 2009 dated 27 June 2016 and Form J for the YA 2010 dated 27 June 2016 are time-barred under s. 91 of the ITA;

(ii) whether the appellant's income during the pioneer period is subject to income tax; and

(iii) whether the DGIR was correct in imposing penalties under sub-s. 113(2) of the ITA for the YAs 2009 to 2013?

Analysis And Decision

[16] It is trite that the decision of SCIT on an appeal against the decision of the DGIR, known as a 'deciding order', is final except that an appeal lies to the High Court on a question of law according to para. 23 read with para. 34, Schedule 5 of the ITA. The High Court when determining such appeal is empowered under para. 39, Schedule 5 of the ITA to:

(i) confirm, discharge or amend the assessment appealed against;

(ii) remit the appeal to the SCIT with directions; or

(iii) make such order as it thinks just and appropriate.

[17] In considering this appeal, I kept in mind the established principles propounded in *Chua Lip Kong v. Director-General Of Inland Revenue* [1981] 1 LNS 157; [1982] 1 MLJ 235; *UHG v. Director General Of Inland Revenue* [1974] 1 LNS 181; [1974] 2 MLJ 33 and *Mamor Sdn Bhd v. Director-General Of Inland Revenue* [1979] 1 LNS 145; [1981] 1 MLJ 117 when dealing with an appeal from the SCIT. The High Court hearing such an appeal is concerned with the facts stated in the case stated as it is the points of law upon those facts that the High Court is asked to decide. The question for this court sitting on appeal is to see whether the SCIT from the primary facts or any assumption made as to the legal effect or consequences of primary facts had misdirected itself on law or reached a conclusion of law which cannot be supported by the primary facts or reached a conclusion on the mixed fact and law that no reasonable similarly constituted tribunal could have reached if the tribunal had correctly directed itself.

Whether The Income Of The Appellant Is Subject To Income Tax

[18] This is the second issue raised by the appellant but the first issue on which submissions were made. I will accordingly address this issue first. The SCIT held that there was no ambiguity in sub-s. 21C(2) of the PIA and that the appellant was only entitled to exemption from income tax on its 'value-added income' under the said subsection.

[19] The appellant submitted that the interpretation made by the DGIR is not correct. It was argued that income tax is only payable on income and that according to the proviso to sub-s. 21C(2) of the PIA, only the 'value-added income' is income. It was contended that by necessary implication, the appellant's inflation-adjusted base income is not income on which liability to tax can even arise. Alternatively, it was contended that the PIA must still be construed as being subjected to 100% exemption under the pioneer certificate dated 30 July 2008 that was granted to the appellant.

[20] The following is the law and provisions that concern the tax liability of the appellant. The charging provisions for the income tax of a company is provided by the ITA. The PIA is a statute that provides for tax relief from income of pioneer companies. A pioneer company is defined under s. 2 of the PIA and means a company certified by a pioneer certificate to be a pioneer company in relation to a promoted activity or promoted product in respect of which the tax relief period has not ended or has not ceased. A pioneer certificate is issued under s. 7 of the PIA.

[21] The facts show that the appellant is a company which was already operating in Malaysia and had made an application to the Minister of International Trade and Industry ("the Minister") for pioneer status under sub-s. 5(1A) of the PIA. The pioneer status was granted to the appellant under sub-s. 6(1AB) of the PIA which provides as follows:

On receipt of an application under subsection 5(1A) the Minister may, subject to subsection (2) to (6), grant pioneer status if he is satisfied that the activity or product qualifies to be deemed as a promoted activity or promoted product under Section 4A.

[22] Subsection 6(5) of the PIA provides that the pioneer status can only be granted by the Minister and with any terms and conditions with the concurrence in writing of the Minister of Finance. Thereafter, to obtain a pioneer certificate, the company given pioneer status must comply with s. 7 of the PIA (the relevant parts) which state as follows:

(1) Any company which has been granted pioneer status under s. 6 shall within twenty-four months from the date of such grant or such extended period as the Minister may allow, request for a pioneer certificate.

(2) A company requesting for a pioneer certificate shall state:

(a) the marketable quantities of the relevant promoted product by its factory prior to the request for the pioneer certificate;

(b) the date on which the factory commenced the production of the promoted product in marketable quantities and the rate of production thereof;

(c) that the conditions imposed under s. 6(2) have been complied with, or where any of the conditions have not been complied with, the reasons therefor.

(3) The Minister ... if satisfied that the conditions have been complied with or with the reasons given under sub-s. (2)(c), he may issue a pioneer certificate certifying:

(a) the company to be a pioneer company;

(b) ...; and

(c) the production day of the pioneer company.

(4) the Minister, with the concurrence in writing of the Minister of Finance, may impose such conditions as he deems fit when issuing a pioneer certificate.

(5) ...

[23] A pioneer company would be entitled to tax reliefs from income tax. According to s. 14 of the PIA, "the tax relief period of a pioneer company shall begin on its production day and continue for a period of five years". The computation of income during the tax relief period of a company which has been granted pioneer status under sub-s. 6(1AB) is s. 21C of the PIA. In this regard, sub-s. 1(2) of the PIA provide that the Act shall be read and construed as one with the ITA while s. 20 of the PIA provide that so much of Part V of the ITA which is applicable to a company shall apply as if the income of a pioneer company in respect of its pioneer business was chargeable to tax.

[24] The issue at hand calls for the interpretation of s. 21C of the PIA which provide as follows:

(1) This section shall apply to a company which has been granted pioneer status under subsection 6(1AB).

(2) Subject to any condition which may be specified in the pioneer certificate of a company issued under s. 7, the income of a pioneer company for each accounting period of its pioneer business shall be computed in accordance with the principal Act by:

(a) treating each such accounting period as the basis period for the year of assessment which includes the last day of the accounting period in question; and

(b) ascertaining the income in question as if it were the statutory income from the pioneer business for that year of assessment:

Provided that in the case of a company that is already operating in Malaysia, the income of the company for each accounting period of its pioneer business shall be the value-added income of the company.

(2A) For the purpose of this section:

(a) "value-added income" means the statutory income for the basis period for the year of assessment less the inflation-adjusted base income; and

(b) "inflation-adjusted base income" shall be determined in accordance with the formula:

(i) for the first year, from the production day:

A (1+B)

where:

A is the average statutory income for up to three years prior to the production day; and

B is the rate of inflation for the basis year;

(ii) for the second year, from the production day onwards:

C (1+B) where:

C is the inflation-adjusted income for the preceding year; and

B is the rate of inflation for the basis year.

(3) The amount of income of the company found under subsection (2) shall be subject to:

(a) any restriction under Section 21A; and

(b) any reduction by an adjusted loss from the pioneer business of that company pursuant to subsection 25(2).

(4) The company shall maintain a statement showing the amount of income found under subsection (2) or (3), as the case may be. (Prior to its amendment on 18.8.2011 by the Promotion of Investments (Amendment) Act 2011 this subsection read: The Director General shall cause to be served on the company a statement showing the amount found under subsection (2) and (3).

(5) (Deleted by the Promotion of Investments (Amendment) Act 2011 on 18.8.2011. Prior to its deletion the subsection read: For the purpose of Section 97 and 99 of the principal Act, a statement served under sub-s. (4) shall be deemed to be a notice of assessment served under the principal Act (not being the notice relating to an assessment made under s. 92 of the principal Act). (emphasis added)

[25] Subsection 21C(2) makes it plain and clear that subject to any condition which may be specified in the pioneer certificate (*ie*, issued under s. 7 of the PIA), the income of the company for each accounting period of its pioneer business:

(i) shall be computed in accordance with the ITA by treating each accounting period as the basis period for the YA; and

(ii) ascertaining the income in question as if it were the statutory income from the pioneer business for that year of assessment.

However, by virtue of the proviso to sub-s. 21C(2), the general position stated in sub-s. (2) does not apply to a pioneer company that was already operating in Malaysia. For such a company, the appellant being one, its income for each accounting period of its pioneer business shall be the 'value-added income'.

[26] What is meant by the phrase 'value-added income' is made plain and clear by sub-s. 21C(2A)(a) wherein the phrase is defined to mean: the statutory income for the basis period for the year of assessment less the inflation-adjusted base income. So, the value-added income of the company is less the 'inflation-adjusted base income' of the company and which income is determined by the statutory formula provided by sub-s. 21C(2A)(b). Thus, only the whole of the appellant's 'value-added income' is exempted while the remaining statutory income is chargeable income for tax purposes. There is no ambiguity in the provision. The SCIT did not misdirect itself in law and had correctly interpreted s. 21C of the PIA.

The Alternative Contention

[27] The alternative contention by the appellant was that sub-s. 21C(2) of the PIA is only applicable subject to any condition which may be specified in the pioneer certificate. This submission was made by referring to the opening words of the said subsection which provide as follows: "subject to any condition which may be specified in the pioneer certificate issued under s. 7 ...". In other words, sub-s. 21C(2) of the PIA may be ousted by a condition specified in the pioneer certificate.

[28] The appellant referred to item No. 5 of the MSC Malaysia bill of guarantees which states as follows: "to provide competitive financial incentives, including Pioneer Status (100 percent tax exemption) for up to ten years or an investment tax allowance for up to five years and no duties on the importation of multimedia equipment" as a condition provided in the pioneer certificate. Item No. 5 is a guarantee of ten guarantees stipulated in the bill of guarantees that is provided to all MSC Malaysia Status companies. It was contended that item No. 5 of the bill of guarantees is a "condition" in the pioneer certificate that confers on the appellant 100 percent tax exemption.

[29] The DGIR strenuously objected to this alternative contention on the ground that it was not one of the agreed issues to be tried before the SCIT. The "statement of agreed issues to be tried" prepared by the parties for the SCIT to determine contained only the following three issues:

(i) whether the notices of additional assessments for the years of assessment 2009 and 2010 are time-barred?

(ii) whether the appellant's income (within the ambit of the pioneer status) during the pioneer period for the years of assessment 2009 to 2016 is value-added income pursuant to the Promotion of Investments Act 1986 ("PIA")?

(iii) whether the respondent is correct in imposing penalty under s. 113(2) of the Income Tax Act 1967 for the years of assessment 2009 to 2013?

[30] The case stated shows that the SCIT only considered these three issues. This fact is further supported by the appellant's arguments before the SCIT where it was submitted that the dispute with the DGIR concerned the interpretation of sub-s. 21C(2) of the PIA for the purposes of the agreed issue (ii) above. The appellant gave what its interpretation was regarding the said subsection which interpretation the SCIT disagreed with. The SCIT decided that the appellant, being a company already been in operation in Malaysia, was only entitled to exemption of its value-added income under sub-s. 21C(2) of the PIA which is determined pursuant to a statutory formula provided in sub-s. 21C(2A). There certainly was no agreed issue or submission made on the alternative contention now being canvassed before this court by the appellant.

[31] This court's jurisdiction hearing an appeal from the deciding order of the SCIT is a limited one. The right of appeal against the deciding order of the SCIT is provided by sub-para. 34(1) of Schedule 5 of the PIA (prior to its amendment) which provided that "either party to proceedings before the special commissioners may appeal on a question of law against a deciding order made in those proceedings" by way of a case stated. Paragraph 37 of the Schedule provides that the case stated shall contain the facts as found by

the Special Commissioners, the deciding order and the grounds of their decision whereas para. 39 states that "the High Court shall hear and determine any questions of law arising on a case stated under para. 34".

[32] In the case stated before me, it is made clear that the parties proceeded on a statement of agreed facts and the three agreed issues to be tried by the SCIT. The case stated included the submissions of the parties, the relevant law and the grounds of decision of the SCIT. The alternative contention was not an agreed issue to be tried and was not canvassed before the SCIT. The SCIT made no decision on the issue.

[33] I have no hesitation in holding that this court has no jurisdiction to determine the alternative contention. Apart from not being an issue before the SCIT, the raising of the alternative contention is an abuse of the process of the court and had denied the DGIR the opportunity to lead evidence to rebut the same had it been an issue that the appellant required the SCIT to determine. It is axiomatic that the established grounds for appellate interference on deciding orders of the SCIT would only arise if the issue being appealed was brought to the attention of and determined by the SCIT. For the above reason, the alternative contention is rejected and not considered by this court.

Whether Assessments For The YAs 2009 And 2010 Time-Barred

[34] On 27 June 2016, the DGIR made the assessment for the YAs 2009 and 2010. The appellant contended that the assessments were made beyond the time provided in sub-s. 91(1) of the ITA and therefore were time-barred. The DGIR in his submissions before the SCIT appeared to rely on the exception to sub-s. 91(1), namely, sub-s. 91(3)(b) of the ITA which allows the DGIR, in a situation where due to the 'negligence' of the taxpayer, to make an assessment in respect of that taxpayer for any year of assessment for the purpose of making good any loss of tax attributable to the negligence in question. It appeared that apart from 'negligence', the SCIT also found that there was 'wilful default' on the part of the appellant which together with 'fraud' are the other two exceptions provided in sub-s. 91(3) of the ITA. In the circumstances, I would only consider whether 'negligence' was made out for the DGIR to make the assessments for the YA 2009 and the YA 2010.

[35] For convenience, I would first and foremost reproduce sub-s. 91(1) and (3) of the ITA:

> (1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within five years after its expiration make an assessment or additional assessment, as the case may be in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

(3) The Director General where it appears to him that:

(a) any form of fraud or wilful default has been committed by or on behalf of any person; or

(b) any person has been negligent,

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

[36] The law is trite. The burden is on the DGIR under s. 91(3) to show that the appellant had been 'negligent' in connection with or in relation to tax for a certain year of assessment. The meaning of the word 'negligent' is not provided in the ITA. In such cases, the principle stated in *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97 would apply, namely, that a word in the taxing statute must be given its ordinary meaning. The ordinary meaning of 'negligent' which is an adjective while 'negligence' being the noun is given in the *Oxford Advanced Learner's Dictionary* as "failing to give somebody/something care or attention especially when this has serious results". The common law principle of 'negligence' would have no application in the taxing statute as the principle there was the creation of the common law to determine the liability of a tortfeasor who had caused damage to another party. A widely referred to the meaning of 'negligence' in our case-law is that from *Whiteman on Income Tax* which states:

... means negligence or a failure to give any notice, make any return, statement or declaration or to produce or furnish any list, document or other information required by the Income Tax Act, but a person is not deemed to have failed to do anything required in a limited time if he does it within such extended time as the Commissioners or officer concerned may allow, where a person has a reasonable excuse or not doing anything required he is deemed not to have failed to do it if he does it without unreasonably delay. It should be noted that even though an incorrect return was not made fraudulently or negligently originally, a subsequent failure to remedy it without unreasonable delay may result in the return being treated as having been made negligently *ab initio*.

[37] The issue for this court to determine is whether the SCIT's decision in holding that the DGIR has successfully discharged the burden of proof that the appellant was negligent in connection with or in relation to tax for a specific year of assessment. The SCIT had made the following findings from the agreed facts:

(i) the return for the YA 2009 was only filed on 6 October 2010 which was 16 months after the accounting period expired together with the return for the YA 2010. It was only after two years and two months, by way of letter dated 29 December 2012 the appellant sought confirmation

whether 100 percent of its statutory income for the pioneer period was exempt from tax under s. 21C of the PIA. The DGIR informed the appellant by letter dated 11 March 2014 that sub-s. 21C(2A) is to be read together with the proviso appearing in sub-s. 21C(2) of the PIA, and as such, the difference between the statutory income and value-added income is subject to income tax;

(ii) the appellant did nothing for about a year and then in a letter dated 1 April 2015 stated that it disagreed with the DGIR's ruling and would file the necessary appeals to the SCIT. Most importantly, it was in this letter that the amendments made to the tax returns for the YA 2009 and YA 2010 was submitted to the DGIR.

[38] On these facts alone the findings of negligence by the SCIT can be upheld. The appellant must take prudent action in seeking the DGIR's view where there is a doubt of the interpretation of a provision by the taxpayer or his tax agent. The appellant contended that the DGIR did not take prompt action and delayed in giving his ruling and issuing the additional assessments. In my mind sub-s. 91(3) of the ITA is clear and unambiguous. It expressly empowers the DGIR to make an assessment where the taxpayer has been negligent. There is no limitation to this power, such as, any contributory conduct on part of the DGIR. The appellant has been careless and even reckless in his responsibility to submit correct returns in the instant case. The responsibility is imposed on the taxpayer by the ITA and the appellant as the taxpayer here clearly failed to give care and attention to the filing of the amended returns promptly according to the ruling of the DGIR.

[39] The circumstances of the case do not warrant appellate interference based on the established grounds. The decision of the SCIT is upheld.

Whether The Imposition Of The Penalty Is Lawful

[40] The DGIR is conferred discretion to impose penalty under sub-s. 113(2) of the ITA in the following words:

Where a person:

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own charge-ability to tax or the charge-ability to tax of any other person, then, ... the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; ...

[41] The law is trite. The discretion conferred on the DGIR cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances (see *Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co* [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135). The Court of Appeal in *Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 10 CLJ 114 clarified that 'good faith' on part of the taxpayer is not a factor when considering whether to impose penalty under sub-s. 113(2) of the ITA in the following passage of the judgment (this passage was quoted with approval by a later panel of the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v. Classic Japan (M) Sdn Bhd* [2022] 3 AMR 813):

> [40] It is without doubt that s. 113(2) of the Act gives a discretion to the respondent to impose a penalty on a person who has failed to observe the requirements of the law as provided in para. 2(a) or (b) of s. 113. Hence the use of the phrase 'the Director General may require that person to pay a penalty'. There is a clear distinction between sub-s 113(1) and sub-s. 113(2). Although paras. 113(1)(a) and (b) and paras 113(2)(a) and (b) are almost identical, but the effect of sub-s. 113(1) is different from sub-s. 113(2). Sub-section 113(1) provides for an offence being committed in the circumstance provided for in para (a) or (b) unless that person 'satisfies the court that the incorrect return or incorrect information was made or given in good faith'. *Whereas sub-s. 113(2) provides for a situation where there is no prosecution under sub-s. 113(1) has been instituted in the circumstances provided for in para. 113(2)(a) or (b), the Director General may require that person to pay a penalty. That being the case, the defence of 'good faith' as found in sub-s. 113(1), and not found in sub-s. 113(2), does not apply to the Director General's discretion under sub-s. 113(2).* We therefore disagree with the appellant's submission on this score. (emphasis added)

[42] The SCIT dismissed the appeal against the imposition of penalty under s. 113(2) of the ITA. This was done after due consideration of all relevant facts and circumstances. The SCIT found that the DGIR had correctly exercised his discretion in imposing the penalty. The undisputed facts show that the appellant had submitted incorrect returns and had further delayed the submission of the amended returns notwithstanding that the DGIR had conveyed his position on the interpretation of s. 21C of the PIA much earlier. The DGIR was clearly authorised to impose a penalty where the taxpayer has submitted an incorrect return.

[43] The penalty imposed was also at a low rate which is an indication that the DGIR had carefully weighed all the circumstances before him. The contention that the appellant had acted in good faith is not a defence to exclude penalty altogether but on the circumstances of each case, and in my view, may in appropriate cases be taken into consideration to reduce the rate of penalty.

[44] One last point on this issue. The appellant relied on *Uniqlo (Malaysia) Sdn Bhd v. Ketua Pengarah Kastam Dan Eksais* [2020] 9 CLJ 521 and argued that the DGIR did not give any reasons for imposing the penalty. The failure

to give reasons had offended the right of natural justice. I found the principle in *Uniqlo (Malaysia) Sdn Bhd* irrelevant to the instant case. Firstly, the case concerned judicial review where the decision of the decision-maker was challenged directly. The instant case is an appeal against the decision of the SCIT on points of law against its decision after hearing an appeal against the decision of the decision-maker. The principles of judicial review and hearing an appeal against the decision of the SCIT are totally different.

[45] Secondly, and not the least important, is the fact that the SCIT is hearing an appeal from the decision of the DGIR which is by way of a rehearing. The decision of the Federal Court in *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1 is instructive as reflected in the following passages as to the function of SCIT:

> [60] Had the respondents filed an appeal before the Special Commissioners, where the onus is on the respondents to establish their position, *they will be accorded every opportunity to show where the appellant went wrong. The respondents may request for the attendance of witnesses to give evidence on oath and request any witness to produce any books, papers or documents which are in his custody or his control necessary for purposes of the appeal*. Therefore, before the Special Commissioners the respondents will have all the opportunity to ventilate his disgruntlement, with every opportunity to undo what the appellant determined (see *Director-General of Inland Revenue v. Lahat Datu Timber Sdn Bhd* [1978] 1 MLJ 203).
>
> [61] At the completion of the hearing of the appeal, the Special Commissioners shall give their decision in the form of an order known as a deciding order, and which in certain circumstances may be final. Either party to the proceedings before the Special Commissioners may appeal on a question of law against a deciding order, or may request the Special Commissioners to state a case (generally known as case stated) for the opinion of the High Court.

[46] Thirdly, the appellant argues that the appellant should not be penalised with a penalty for having a different view on the interpretation of sub-s. 21C(2) of the PIA after having engaged professional tax agents to prepare and submit their tax agents. The fact that the appellant or its tax agent has a different interpretation does not absolve the taxpayer of its liability. The taxpayer or its agent failed to take prudent action on the facts of the instant case as shown above. I find the point devoid of merit.

Conclusion

[47] For the above reasons there is no reason for this court to interfere with the deciding order of the SCIT. The appeal is dismissed.